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No. 170

In the

Supreme Court of the United States

OCTOBER TERM, 1958

CEPHAS E. SWORD and HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,
Petitioners,

v.

GULF OIL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix "A" of Petition) is reported at *251 F. 2d 829.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals in this case followed the applicable substantive law of Texas.

2.

Whether determination by the Courts, rather than a jury, of the existence or non-existence of legal duties claimed to rest upon Respondent, violates the Seventh Amendment to the Constitution of the United States.

3.

Whether the doctrine announced in *Slocum v. New York Life Insurance Company, 228 U. S. 381*, prevents the entry of judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Seventh Amendment thereto) and the statute involved, the Rule of Decision Act (28 U. S. C. Section 1652), are set forth in the petition, at page 4.

STATEMENT

Without Dispute:

Respondent was the owner of an oil and gas lease covering minerals beneath "flat ranch land" (R. 153) in Upton County, Texas. Wanting to minerally explore this lease-

hold, it contracted with Hall & Stewart Drilling Company for the drilling of an exploratory well (R. 139-151). The contract provided that Hall & Stewart Drilling Company should furnish all safety devices and appliances for the safety of workmen (R. 40), as well as furnish the workmen, derrick, engines, motors and machinery (R. 146), required for the drilling of the well. The drilling work was to be performed and supervised by Hall & Stewart (R. 140) and the work involving the accident was being done under the supervision and control of Hall & Stewart (R. 54, 101, 157). It was stipulated in trial that Hall & Stewart "were independent contractors" (R. 134).

Under the contract, Gulf delivered possession of the premises to Hall & Stewart (Stipulation, R. 172), who commenced drilling operations and prosecuted the same to the 13,100-foot depth (R. 154, 155) when accident happened.

On the day of accident (as on all other days), Hall & Stewart's equipment was in use, and it was Hall & Stewart's properties which became involved in the events of accident (R. 55, 68, 99). No equipment belonging to Gulf was in any manner involved in the mishap (R. 54, 90, 110, 155, 157).

Petitioner was an employee of Hall & Stewart (R. 15) and was working under the supervision of his independent contractor-employer, Hall & Stewart, during all the time involved in his accident (R. 54, 101, 157). He was not working under the supervision or direction of any Gulf

employee (R. 54). None of Gulf's men were even present (R. 34). Respondent's connection with the accident is that it furnished the oil and gas leasehold estate and contracted with an independent contractor for the drilling of a well (R. 158).

The accident happened in morning daylight (R. 35). Petitioner's driller had "cut the drilling off" because of a pressure failure (R. 17). Petitioner's driller had "ordered" (R. 18) a check for air leaks and Petitioner, a motorman, went between his motors and behind the draw-works, checking his motor clutches (R. 18). Starting back toward the driller's position (R. 42, 47), Petitioner "took a short-cut across the top of the machinery rather than going around the draw-works to get where" he "wanted to go" (R. 41, 42). No Gulf man had told him to do what he was doing when accident happened (R. 54). Ordinarily, in going from where he was to where he wanted to go, Petitioner said he would have made the trip around the draw-works and not over machinery (R. 53).

On his short-cut across the top of the machinery (R. 41), Petitioner was on top of a chain guard compound (R. 45) and had "started over the master clutch" (R. 49). "I had mud on my feet * * * my foot slipped off of there and the suction from the master clutch, the motors had been revved up and turning so fast it sucked my leg back into the master clutch" (R. 23); "I put my left foot over that thing to put my left foot over there and it slipped off" (R. 52).

The master clutch was enclosed on all but one of its sides (R. 70), the open side facing the chain guard compound "about a foot away" (R. 70). The intervening area was not a walk-way (R. 71). The open side had no mesh guard on it (R. 71).

Gulf had made no inspection of Hall & Stewart's machinery to determine the presence or lack of a safety guard (R. 158).

In the pleadings on which the case was tried, it was alleged that Gulf was guilty of negligence (1) "in failing to make an inspection of the rig floor, particularly the master clutch, to see if the same was properly guarded with a guard" (R. 13); (2) "in failing to warn plaintiff of the absence of the guard over the master clutch" (R. 13); and (3) "in failing to provide a safe place to work" (R. 13).

The case was tried before a jury on fully developed facts. At the close of all evidence in the case, Respondent made its motion for instructed verdict (R. 204), which was then overruled (R. 227), and, after argument of counsel, the Court gave his oral charge to the jury. Before the jury commenced its deliberations on the case, the Court withdrew from jury consideration the part and portions of the charge which represented Gulf's defenses and those which its counsel had emphasized in jury argument (R. 202, 203). With the defensive side of the case withdrawn from jury consideration, the jury was unable to unanimously agree upon a verdict. It was then discharged. Respondent after-

wards presented its motion for judgment, based upon the grounds of its motion for instructed verdict, and presented its motion for summary judgment. It was in grant of these motions (R. 228) that the judgment was entered in favor of Respondent (R. 226-228).

ARGUMENT

The Trial Court and Court of Appeals Both Correctly Applied the Applicable Substantive Law of the State of Texas in Determining that Respondent Owed to Petitioner No Legal Duty that Might Have Been Breached

The only thing furnished by Respondent to Hall & Stewart, and its employees, including Petitioner, was the possession (Stipulation, R. 172) of a piece of "flat ranch land" (R. 154). The dangerous condition giving rise to the accident in suit was in the drilling rig and its equipment belonging to and delivered by Hall & Stewart to the location after Hall & Stewart had taken possession of the drillsite from Respondent. Of this rig and its equipment Gulf never had either possession or control, and no claim has been made that it had taken over either possession or control.

Having thus surrendered possession (Stipulation, R. 172) of the safe "flat ranch land" embracing the drillsite, no duty to Petitioner and no liability to Petitioner could arise against Respondent by reason of its oil and gas leasehold estate. *Restatement of Torts, Sec. 354.* This is so plain

that Petitioner has never at any stage of the proceedings in this case seriously suggested the contrary.

Instead, Petitioner seeks to impose a duty upon Respondent like those of an occupier of land on the theory that Respondent enjoyed a status such as that of the independent contractor in *Smith v. Henger (Tex. Sup. Ct., 1950), 226 S. W. 2d 425*, or, the supplier of chattels and director of drilling operations in *Roosth & Genecov Production Co. v. White (Tex. Sup Ct., 1953), 262 S. W. 2d 99.*

Failing in this, Petitioner seeks to establish a duty of care in exercising a supposed reserved right of coordination under *Section 414* of the *Restatement of Torts.* Finally, with all else failing, Petitioner seeks to show that the drilling of an oil well is "inherently dangerous work" and that Respondent, as the employer of an independent contractor hired to do this "inherently dangerous work," as a matter of public policy is liable to third persons for injuries arising from the conduct of this dangerous work, and that Petitioner is such a third person who can claim the benefits of the doctrine.

The doctrine of and duties announced in *Smith v. Henger (Tex. Sup. Ct., 1950), 226 S. W. 2d 425*, clearly rest upon control of the premises involved. *226 S. W. 2d 425, 430, 431.* In this case, possession and control of the rig, its engines and the clutch guard, as well as all other equipment and the drillsite, were in Hall & Stewart, Petitioner's employer, and were not in Respondent. No claim to the con-

trary has ever in this case been made. All that Gulf had was the privilege, under its contract, to inspect the work performed by Hall & Stewart, to see if the work was being done according to the terms of the contract (Ph. 19 of the drilling contract, R. 142). Without dispute, the evidence also shows not a single attempt in any way on the part of Gulf to exercise any possession or control of the drillsite or rig and equipment thereon, including the equipment involved in accident, after surrender of the drillsite to Hall & Stewart.

Roosth & Genecov Production Company v. White (Tex. Sup. Ct., 1953), 262 S. W. 2d 99, likewise imposes no duty upon Respondent. This case involved the duties of a supplier of defective chattels who actually directed the drilling work. If Gulf, instead of Hall & Stewart, had furnished the rig and equipment involved in this accident and controlled and directed the work, then the *Roosth* case could well be authority for the existence of a duty to Petitioner on the part of Respondent. All Respondent furnished in this case, however, was a safe piece of "flat ranch land" (R. 154), in no way responsible for or connected with the accident. Respondent did not have possession of the location or the equipment thereon (Stipulation, R. 172), was not supervising or directing the work (R. 54), and had only the privilege and not the duty, under the contract, to inspect the work performed by Hall & Stewart (Ph. 19 of the drilling contract, R. 142).

Regarding Petitioner's next to last contention, *Section 414* of the *Restatement of Torts* offers Petitioner no help. Petitioner concludes for himself that under the drilling contract involved (R. 139-142), Respondent reserved unto itself the status of a "coordinator," hoping to come under the theory of liability set forth in *Section 414* of the *Restatement*, as illustrated in *Berquist v. Penterman (Superior Court of N. J., 1957), 134 Atl. 2d 20.* A reading of the contract reveals that it is not subject to any construction remotely resembling Petitioner's conclusion. Even if the Court assumed such right of coordination, however, liability can nevertheless be predicated only on negligence in exercising the retained control. In this case there is not a word of pleading, and not a scintilla of evidence that this accident was caused or affected in any way by the manner in which Respondent exercised this so-called reserved right of "coordination." In fact, Petitioner's first suggestion of this theory came on motion for rehearing in the Court of Appeals.

Lastly, the "inherently dangerous work" theory can get Petitioner nowhere. In the first place, there is neither pleading nor proof that the work here involved was inherently dangerous. Secondly, the work of drilling an oil well is probably not "inherently dangerous work." See *Restatement of Torts, Section 427a*, and *Roosth & Genecov Production Company v. White (Tex. Sup. Ct., 1953), 262 S. W. 2d 99, 102.*

Even if the work were "inherently dangerous," however, it is plain, under the law of Texas, that Petitioner is not

a person to whom the benefits of the doctrine extend, that is, he is not a third person to whom a contractee of an independent contractor is liable for damages arising out of the performance of "inherently dangerous work." In Texas, the doctrine does not inure to the benefit of an employee of the independent contractor engaged in doing the "inherently dangerous work." *Humble v. Bell (Tex. Civ. App., 1943), 180 S. W. 2d 970 (error refused for want of merit, by the Texas Supreme Court, 181 S. W. 2d 569); Cagle v. McQueen (C. A. 5, 1953), 200 F. 2d 186; Nance Exploration Co. v. Texas Employers' Ins. Ass'n. (Tex. Civ. App., 1957), 305 S. W. 2d 621, 627, error refused, no reversible error,* rehearing on application for writ of error denied July 23, 1958. The cases of *Lloyd v. Herrington (Tex. Sup. Ct., 1943), 182 S. W. 2d 1003,* and *Texas Electric Service Co. v. Holt (Tex. Civ. App., 1952), 249 S. W. 2d 664, error refused, no reversible error,* cited by Petitioner, do not hold to the contrary. In fact, in both cases relied on by Petitioner, judgments for plaintiffs were even reversed and rendered for the defendant employers of independent contractors.

Thus, the Court of Appeals properly and correctly held that Respondent owed no legal duty to Petitioner that Petitioner has in any manner attempted to plead and show was or could have been in any manner breached, and that Petitioner's efforts to place on Gulf the duties owed him by his employer, Hall & Stewart, must fail. Accordingly, under the law of Texas, Petitioner can never have final judgment against Respondent in this case.

Determination by the Courts, Rather than by a Jury, of the Non-Existence of Duties Claimed to Rest Upon Respondent Does Not Violate the Seventh Amendment of Our Constitution

It is to be noted that Petitioner, in his petition, has not pointed out in any manner wherein Petitioner was denied his constitutional right to trial by jury. It is just as easy to show that such rights were not violated in this case, however, as it is for Petitioner to state his conclusion.

The rulings of both the trial Court and the Court of Appeals were on lack of existence of legal duties owing by Respondent to Petitioner that were alleged to be breached or that might have been breached in this case. Clearly, no attempt has ever been made by the Courts in this case to determine whether there was or was not, in fact, a breach of existing duties, or whether any such breach was a cause or could have been a cause of accident.

Of course, an indispensable element of actionable negligence is the existence of a duty. *38 Am. Jur. 651, 652; Northern R. Co. v. Page, 274 U. S. 65.*

Certainly, the determination of the existence or non-existence of claimed duties on which to predicate claims of negligent breach is for the Courts to decide, and not for juries to determine as matters of fact. *City of Bryan v. Jenkins (Tex. Civ. App., 1952), 247 S. W. 2d 925, error refused, no reversible error; New York & Porto Rico SS Co. v. Guanica Centrale (C. C. A. N. Y., 1916), 231 Fed.*

820; Fuller v. Citizens Nat. Bank (C. C. Ohio, 1882), 15 Fed. 875; 65 C. J. S. Negligence, Sec. 287, p. 1233; 30-B Tex. Jur. 175-177.

Inasmuch as there is a total lack of any legal duty owed by Respondent to Petitioner that has been shown or correctly suggested to exist, after the facts of the case had been fully developed at a full and complete trial, there was nothing to submit to the jury. Accordingly, there was no denial of trial by jury as guaranteed by the Seventh Amendment to the Constitution. The right of trial by jury extends only to questions of fact that remain to be settled. See *Tompkins v. Erie R. Co. (C. C. A. 2, 1938), 98 F. 2d 49 (cert. denied, 305 U. S. 637, rehearing denied, 305 U. S. 673).*

Respondent in this case has shown that it was entitled to a directed verdict which clearly does not violate the Seventh Amendment to the Constitution, though it does deny jury verdict. See *Galloway v. United States, 319 U. S. 372, 394.*

The Granting of Respondent's Motion for Summary Judgment Based on a Full and Complete Transcript of All of the Evidence Developed at a Full and Complete Trial of the Case on the Merits Was Proper

Petitioner's first complaint of the procedures used in this case comes in this Court. Now, he seeks to have this Court find, in some manner, that *Slocum v. New York Life*

Insurance Company, 228 U. S. 381, prevents the trial Court from granting Respondent summary judgment and requires that a new trial be ordered.

The *Slocum* case, insofar as this case is concerned, only involved the circumstance of the trial Judge substituting his opinion of the evidence for that of the jury, in overturning the jury's verdict and granting judgment for the Defendant, this Court holding that having overturned the verdict, the trial Court could only grant a new trial. The *Slocum* case did not in any way involve a question such as is here presented. Here, we are not concerned with how the evidence might be construed by reasonable men in arriving at negligence and proximate cause findings, but rather, we are dealing with the essential underlying proportions of law that no duty existed on Respondent's part toward Petitioner, on which to predicate a finding by anyone of a breach. As pointed out in *Galloway v. United States, 319 U. S. 372, 394*, the *Slocum* case does not prevent the direction of a verdict when the law disposes of the case.

Respondent has here followed the summary judgment provisions of the *Federal Rules of Civil Procedure, Rule 56*, and is entitled to the same under the standard set forth by this Court in *Sartor v. Arkansas Natural Gas Corporation, 321 U. S. 620, 627*, wherein the Court noted that summary judgment is authorized where a moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue of fact remains for trial. These requirements have been satisfied and the procedures involved present no error.

THERE IS NO CONFLICT IN THE DECISIONS

At page 11 of his petition, Petitioner says the decision below conflicts with the decision in *McKee v. Patterson (Tex. Sup. Ct., 1954), 271 S. W. 2d 391.* At page 16 of the petition, he says the decision in this case conflicts with nine other cases. These statements are not true.

In *McKee v. Patterson (Tex. Sup. Ct., 1954), 271 S. W. 2d 391,* the Court reversed and rendered judgment for the defendant-general contractor, holding that the dangers there involved, as a matter of law, were open and obvious to the plaintiff and that, accordingly, the general contractor who controlled the premises and operations owed no duty to the injured plaintiff, either to provide a safe place to work or to warn of dangers. Here, Hall & Stewart controlled the premises and operations involved, and not Respondent.

In *Gulf Oil Corporation v. Wright (C. A. 5, 1956), 236 F. 2d 46,* Gulf was performing the functions it had reserved unto itself by its contract, which functions resulted in the death involved. Here, Hall & Stewart, and not Respondent, was performing and controlling the operations and its own instrumentalities involved in accident, and not Respondent.

In *Sun Oil Company v. Pierce (C. A. 5, 1955), 224 F. 2d 580,* the defendant was in control of the drilling rig, directing and controlling the operations thereon. Here, Hall & Stewart, and not Respondent, was in control of the drilling rig and its operations.

In *United Production Corporation v. Chessir (C. A. 5, 1939), 107 F. 2d 850*, the defendant was in possession of and was operating the defectively equipped drilling rig involved. Here, Hall & Stewart, and not Respondent, furnished, was in possession of and operating the defective equipment.

In *Amacker v. Skelly Oil Company (C. A. 5, 1943), 132 F. 2d 431*, the defendant possessed and controlled the storage tank involved, and directed the act which brought about injuries. Here, Hall & Stewart, and not Respondent, was possessed of and controlled the properties involved in accident, and directed the activities out of which the accident arose.

Roosth & Genecov Production Company v. White (Tex. Sup. Ct., 1953), 262 S. W. 2d 99, involved a defendant who supplied defective equipment and was in charge of and directed the operations out of which accident occurred. Here, Hall & Stewart, not Respondent, furnished the defective equipment and directed and controlled the operations out of which accident occurred.

In *Smith v. Henger (Tex. Sup. Ct., 1950), 226 S. W. 2d 425*, the defendant had control of the premises involved and the operations thereon. Here, Hall & Stewart, and not Respondent, had possession and control of the premises involved.

Texas Electric Service Company v. Holt (Tex. Civ. App., 1952), 249 S. W. 2d 664, error refused, no reversible error, involved an affirmative action of alleged negligence on the part of defendant. There is no suggestion in this case that

Respondent was actively or affirmatively negligent in any manner.

Wright v. Tudor City Twelfth Unit, Inc., et al., 12 N. E. 2d 307, involved a defendant in possession of the premises where injury occurred and an injured plaintiff, who was a member of the general public, and not an employee of an independent contractor employed to do the work out of which the accident arose, as in this case.

In *Phillips Petroleum Company v. Gibson, 232 F. 2d 13, 1 L. Ed. 2d 71*, the defendant had furnished the kerosene barrel that exploded. Here, Gulf furnished nothing, except the drillsite on which Hall & Stewart placed their defective equipment .

CONCLUSION

The Courts below have properly handled and properly disposed of this case. Accordingly, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing were deposited in the United States mail at Midland, Texas, each in properly stamped envelopes addressed to respective counsel for Petitioner, viz.: John J. Watts, Esq., at his post office address, P. O. Box 1031, Odessa, Texas; W. O. Shafer, Esq., at his post office address, P. O. Box 1552, Odessa, Texas; and Warren E. Miller, Esq., Suite 1012, Barr Building, 910 Seventeenth Street N.W., Washington 6, D. C., this the day of August, 1958.

THIS I CERTIFY:

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